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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

OREGON RIVERWATCH, Plaintiff	)	Case No. 06-CV-06246-AA
v.	)	
METROPOLITAN WASTEWATER MANAGEMENT COMMISSION, et al, Defendants	)	**ORAL ARGUMENT REQUESTED**

COMMENTS OF AMICUS UNITED STATES ON PROPOSED CONSENT JUDGMENT

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COMMENTS OF AMICUS UNITED STATES ON PROPOSED CONSENT JUDGMENT

The United States made a good faith effort to resolve its concerns regarding the proposed consent judgment in this matter with the parties, by telephone and electronic mail, before filing the following comments, and has been unable to do so.

This is a Clean Water Act ("CWA") citizen suit brought by Oregon Riverwatch ("Plaintiff") against the City of Eugene, the City of Springfield, and the Metropolitan Wastewater Management Commission ("MWMC") (collectively referred to as "Defendants"). The parties have entered into a proposed consent judgment and have submitted it to the Court

with a request that the Court enter a judgment of dismissal but retain jurisdiction for purposes of enforcement. The United States previously filed a motion in this case requesting that the Court provide the statutory 45-day period for review and comment by the United States set forth by the CWA. See 33 U.S.C. § 1365; United States Motion to Apply Statutory 45-Day Review Period Before Entry of Consent Judgment (filed July 3, 2007) (Attachment A).

The United States now submits its comments on the proposed consent judgment. As discussed below, the proposed consent judgment provides very limited injunctive relief to remedy the alleged violations of law. As explained in section II below, the injunctive provisions included in the settlement largely require defendants to take actions that they are already obligated to take under existing statutory or permit requirements. The most significant obligations imposed on Defendants under the settlement are a requirement that they pay $65,000 to an environmental organization (paragraph 4.3) and pay $120,000 in attorney's fees (paragraph 4.6). Because the proposed consent judgment does little, if anything, to abate the serious violations of the law alleged in Plaintiff's complaint or to bring Defendants into compliance with the law on an enforceable schedule, the United States has serious concerns that the proposed settlement is inconsistent with the purposes of the citizen suit provision of the Clean Water Act. Citizen suits under the Act are intended to abate violations of the law, and any monetary payments should be secondary elements of a settlement. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 61 (1987) (explaining that the principal purpose of the citizens suit provision of the CWA is to allow private parties to abate violations of the law); Sierra Club v. Electronic Controls Design, Inc., 909 F.2d 1350, 1355 (9th Cir. 1990) (to be approved, a citizen settlement must "further[] the objectives upon which the law is based").

The United States is pursuing its own enforcement and permitting oversight options in this matter. Thus, although the United States considers the lack of injunctive relief to be at odds with the purposes of the Clean Water Act, the United States does not ask that the Court seek to incorporate additional relief in this document. However, the United States requests that, if the Court determines that it is appropriate to enter this consent judgment, it do so subject to Court-ordered conditions that will discourage the recurrence of these circumstances. The United States opposes entry of this consent judgment without imposition of such conditions.

BACKGROUND

A. STATUTORY BACKGROUND

The Clean Water Act, 33 U.S.C. § 1251 et seq., and the Clean Air Act, 42 U.S.C. § 7401 et seq., both provide for private citizen suits, and have similarly worded provisions providing for service of proposed consent judgments on the Attorney General and the Administrator of the Environmental Protection Agency (EPA), 45 days before such a judgment may be entered by the court. See 33 U.S.C. § 1365(c)(3), 42 U.S.C. § 7604(c)(3). The Clean Water Act's provision states, in pertinent part: "No consent judgment shall be entered in an action in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator." 33 U.S.C. § 1365(c)(3). This provision is intended to allow the United States to review a proposed CWA consent judgment and offer its views to the court as to whether the consent judgment is in the public interest before final resolution of the citizen suit case.

B. FACTUAL AND PROCEDURAL BACKGROUND

1. Sanitary Sewer Overflows under the Clean Water Act

Defendants own and operate a sanitary sewer system that collects and conveys domestic and commercial wastewater to the Defendants' wastewater treatment facility ("Facility").[1/] Defendants are authorized to discharge treated wastewater into the Willamette River via Outfalls 001 and 001A pursuant to a National Pollutant Discharge Elimination System ("NPDES") permit issued by the Oregon Department of Environmental Quality ("ODEQ"), NPDES Permit No. 102486 ("Permit").

The Permit also covers a number of emergency overflow outfalls that discharge into the Willamette River and various tributaries to the Willamette River. Specifically, the Permit states that:

> Raw sewage discharges are prohibited [from the emergency overflow outfalls] to waters of the State from November 1 through May 21, except during a storm event greater than the one-in-five-year, 24-hour duration storm, and from May 22 through October 31, except during a storm event greater than one-in-ten-year, 24-hour duration storm.

Permit at Schedule A, Section 1.c. Furthermore, the Permit states that uncontrolled overflows are prohibited. See Permit at Schedule F, Section B.6. An "uncontrolled overflow" is defined as

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[1/] A sanitary sewer system is a wastewater collection system that is specifically designed to collect and convey sanitary wastewater, i.e., domestic sewage from homes as well as industrial and commercial wastewater. (The motion the United States filed in this matter on July 3, 2007, stated on page 9 that this case involved a storm water collection system. We note that this statement was incorrect and should have referenced a sanitary sewer system.)

"the diversion of waste streams other than through a designed overflow device or structure, for example overflowing manholes…." Id.

a. *The SSO Problem Nationwide*. Overflow discharges from sanitary sewer systems can occur for many reasons, including when the collection system exceeds capacity due to wet weather as the result of infiltration and inflow, when normal dry weather flow is blocked (e.g., by tree roots), or when mechanical failures prevent the system from proper operation. Such overflows are referred to as sanitary sewer overflows or SSOs. SSOs include overflows from outfalls that reach waters of the United States, such as the Willamette River, as well as overflows out of manholes that may or may not reach waters of the United States.[2/]

SSOs can cause serious human health and environmental impacts. The principal pollutants found in SSOs are microbial pathogens, oxygen depleting substances, suspended solids, toxics, nutrients, and floatables. See Report to Congress: Impacts and Control of CSOs and SSOs, prepared by EPA, dated Aug. 2004, at 5-2.[3/] The potential impact of a specific SSO depends on a variety of factors including flow and background pollutant concentrations in the receiving water, as well as the volume and strength of the discharge. Id. at 5-9. The discharge of untreated wastewater, can significantly impair a number of designated uses of a water body including, but not limited to, recreation, shellfish harvesting, and aquatic life. Id. at 5-3. For example, an SSO that occurred near Oceanside, California resulted in the discharge of approximately 2.73 million gallons of untreated sewage. Data showed that the dissolved oxygen

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[2/] SSOs, including those that do not reach waters of the United States, may be indicative of improper operation and maintenance of the sanitary sewer system, and thus may violate the operation and maintenance conditions of a NPDES permit.

[3/] Excerpts are in Attachment B, or see http://cfpub.epa.gov/npdes/cso/cpolicy_report2004.cfm.

levels in the area dropped below 1 mg/L, which was well below the numeric criteria of 5 mg/L and the levels needed to support most aquatic life. The documented effects on aquatic life included 320 dead fish, 67 dead shrimp, and 169 dead clams. Id. at 5-18. This is just one example of the potential environmental impact of SSOs.

SSOs can also adversely affect human health due to the discharge of microbial pathogens (i.e., bacteria, viruses and parasites) and toxics. Id. at 6-2. These pollutants can harm human health through recreation or ingestion of fish and other organisms. Id. For example, according to EPA's 2004 Report to Congress, a number of studies have documented the increased risks of gastroenteritis among individuals who recreate in water contaminated with microbial pathogens. Id. at 6-7. SSOs that occur through manholes or basement backups create exposure pathways through dermal contact. Id. at 6-14.

EPA has taken and continues to take SSOs very seriously. Because of the serious human health and environmental consequences associated with discharges of untreated wastewater, EPA has established wet weather wastewater discharges as a national enforcement priority.[4/] Between 1995 and 2003, EPA brought approximately 26 judicial actions, 80 administrative compliance orders, and 12 administrative penalty cases against municipalities for SSOs.[5/]

[4/] EPA's policy document states: "Discharges from wet weather events are the leading causes of water quality impairment as documented in Clean Water Act (CWA) Section 305(b) reports and represent significant threats to public health and the environment. The discharges come from overflows from combined sewers or sanitary sewers, concentrated animal feeding operations (CAFO) discharges and run-off, and storm water run-off. . ." EPA National Program Managers Guidance, FY 2006, at 5, available at http://www.epa.gov/ocfo/npmguidance/oeca/2005/oeca_npmguidance.pdf .

[5/] EPA Report to Congress: Impacts and Controls of CSOs and SSOs, at 7-11 to 7-12.

b. *The SSOs In This Case*. SSOs from the emergency overflow outfalls in Defendants' sanitary sewer system discharge into the Willamette River, A-2 Channel, A-3 Channel, and numerous drainage ditches in the Eugene-Springfield area. Furthermore, uncontrolled SSOs from surcharging manholes have resulted in the discharge or potential discharge of untreated sewage to water bodies such as Amazon Creek, Debrick Slough, and the A-2 Channel. See SSO Notification Letters to ODEQ, dated Dec. 18, 2003, January 19, 2006, and December 29, 2006. Thus, the receiving waters for SSOs from the sanitary sewer system are the Willamette River, A-2 Channel, A-3 Channel, Amazon Creek, Debrick Slough, and various drainage ditches.

The entire Willamette River Basin is subject to a total maximum daily load ("TMDL") for bacteria, temperature, and mercury.[6] See Willamette River Basin TMDL, prepared by ODEQ (2006). The portion of the Willamette River Basin that the Facility discharges into is part of the Upper Willamette River Subbasin which includes tributaries to the Willamette River such as Amazon Creek and the various drainage channels in the Eugene-Springfield area. See id. at Ch. 10. ODEQ has stated that one of the potential sources of bacteria in the Upper Willamette River Subbasin include sanitary sewer overflows. Id. at 10-53. Although the majority of the SSOs discharge into a portion of the Willamette River that is not impaired for bacteria, SSOs that occur within this subbasin could cause or contribute to water quality impairment at the point of discharge and/or could aggravate water quality impairment in downstream reaches. Moreover, some of the SSOs that occurred discharged into, or could have discharged into, the A-

[6] A TMDL is developed on a pollutant-specific basis when a water body is impaired for that pollutant. A TMDL quantifies pollutant sources and allocates allowable loads to point and non-point sources that discharge into the water body. See Guidance for Water Quality-Based Decisions: The TMDL Process, prepared by EPA, dated April 1991, at Ch. 2.

3 Channel and Amazon Creek. Both of these water bodies are impaired for *E. coli* and are addressed in the Willamette River Basin TMDL. All of the loading capacity for these receiving waters has been allocated to existing non-point and point source discharges. It appears that SSO discharges are not identified point sources with applicable waste load allocations in the portion of the Willamette River Basin TMDL relating to these two bodies of water. Thus, any SSOs that discharge into these water bodies will likely cause further water quality impairment and will likely cause or contribute to an exceedance of the water quality standard.[7/]

2. This Litigation

Plaintiff sent a notice of intent to sue to Defendants on June 6, 2006 ("60-day Notice").[8/] The notice stated that it encompassed violations occurring between June 1, 2001 and June 1, 2006; it asserted that the Facility operated by Defendants experiences flows in excess of its capacity during some wet weather situations. It stated that the "failing collection system" of the Facility experienced inflow and infiltration during wet weather, causing the system to exceed its rated capacity and therefore discharge raw sewage from the collection system, an SSO. It alleged that the Facility experiences "other SSOs which cause the discharge of untreated waste." The notice also referred to six specific discharges from overflowing manholes and to underground exfiltration as well as other discharges.[9/]

[7/]As discussed below, the United States is presently pursuing permitting and enforcement options in this matter. The United States will therefore not provide a full legal analysis of the CWA violations alleged in the NOIs and complaint at this time.

[8/] A copy of this notice is appended to Plaintiff's Complaint.

[9/] The notice also alleged other types of violations, such as failure to comply with reporting requirements.

Plaintiff filed its complaint on October 6, 2006. The complaint asserted that Defendants were "routinely violating" the Clean Water Act, and cited to the violations identified in the 60-day Notice. The complaint sought (1) declaratory relief; (2) "an injunction ordering defendants to operate the Facility in compliance with the CWA and applicable effluent and receiving water limitations in the Facility's permits, as well as state and federal standards"; (3) an order that Defendants pay "civil penalties for violation per day for its violations of the CWA"; (4) reasonable attorney's fees and costs, and (5) unspecified other relief.

In the first four months of 2007, the parties conducted discovery, and a defendant (Lane County) was dismissed from the case by stipulation. Plaintiff filed a supplemental 60-day notice on April 4, 2007, which listed a number of additional SSO events.

The matter was referred to Magistrate Judge Coffin for settlement discussions. There were three settlement conferences, occurring on May 1, May 30th, and June 15. On June 22, the parties filed their proposed consent judgment, which is accompanied by a draft judgment of dismissal for signature by this Court.

During settlement discussions, the parties sought the views of the United States regarding a supplemental environmental project provision that they were considering including as a term of settlement. The United States received this request in mid-May, 2007. The United States provided comments on that issue. On further review of the draft agreement under negotiation (which resembled the document now before the Court in many respects), the United States also noted that the document did not have provisions specifically addressing compliance with the applicable statutory and regulatory requirements. The United States suggested to the parties that in their settlement discussions it would be appropriate to consider specific provisions addressing

injunctive relief.[10/] To that end, the United States provided sample language to facilitate the parties' discussions. Defendants have a Wet Weather Flow Management Plan ("Wet Weather Plan") for upgrading their sanitary sewer system by January 1, 2010, to ensure that SSOs are eliminated by that date. The sample language would have provided a judicially approved timetable for completing this plan. The sample language was drawn from previous consent decrees settling civil enforcement actions that the United States has negotiated (at arm's length) with municipalities relating to discharges from their collection systems. It included specific provisions allowing additional time to complete this schedule in the event of an emergency precluding Defendants from meeting the deadline. These provisions were offered as a point of departure for the parties' discussions, rather than as mandatory language.

The United States also participated (through Assistant United States Attorney James Sutherland) in the parties' final settlement negotiations before Judge Coffin.[11/] The parties decided not to include the injunctive provision recommended by the United States, and instead, on June 22, filed the consent judgment which is now before the Court. At the settlement proceedings Judge Coffin stated that the United States would have until August 3 to submit comments on the settlement.

[10/] In order to avoid intruding needlessly on the confidentiality of the parties' settlement discussions, we confine our discussion of the settlement process in this case to a general summary. We provide additional detail as to our own positions and statements, as to which there is less danger of such intrusion.

[11/] Plaintiff's brief asserts that the United States took the position in those discussions that failure to include a provision addressing completion of Defendants' Wet Weather Plan was the "only issue that they were contesting." Plaintiffs Opposition to Amicus at 3. As discussed below, inadequacy of injunctive relief is indeed at the core of the United States's concerns in this matter. The issue of whether a settlement agreement is a "consent judgment" emerged as a second important issue after this settlement discussion.

Plaintiff also submitted a letter to the Court, dated June 22, 2007, stating that the Clean Water Act's statutory 45-day period does not apply to this document because it was captioned a "settlement agreement." On July 3, the United States filed a Motion to Apply Statutory 45-Day Review Period Before Entry of Consent Judgment, which asserted that the statutory 45 day period did apply, and stating that United States would submit comments by August 3, 2007. The parties filed responses and did not oppose that date (although they took issue with other aspects of the United States's submission).

The United States now files its comments.

ARGUMENT

I. THE DISTRICT COURT REVIEWS PROPOSED CITIZEN SUIT CONSENT JUDGMENTS TO DETERMINE WHETHER THEY ARE IN THE PUBLIC INTEREST AND CONSISTENT WITH THE PURPOSES OF THE CLEAN WATER ACT

A district court reviews a proposed consent judgment to determine whether it is fair, reasonable and equitable, and does not violate the law or public policy. Sierra Club v. Electronic Controls Design, Inc., 909 F.2d 1350, 1355 (9th Cir. 1990); Ibarra v. Texas Employment Commission, 823 F.2d 873, 878 (5th Cir. 1987); Citizens for a Better Environment v. Gorsuch, 718 F.2d 1117, 1126 (D.C. Cir. 1983), cert. denied, 467 U.S. 1219 (1984). When reviewing a proposed judgment in an action between private parties commenced to vindicate public interests, such as this one, the district court should be particularly vigilant. See Janus Films, Inc. v. Miller, 801 F.2d 578, 582 (2d Cir. 1986). A court's authority to approve a proposed consent judgment is always constrained by the statutory framework underlying the action. As the Supreme Court

explained in Local No. 93, International Association of Firefighters v. City of Cleveland, 478 U.S. 501, 525 (1986) (citations omitted):

> [A] federal court is more than "a recorder of contracts" from whom parties can purchase injunctions; it is "an organ of government constituted to make judicial decisions * * * ." [T]he consent decree must "come within the general scope of the case made by the pleadings," and must further the objectives of the law upon which the complaint was based.

Thus, "parties may [not] agree to take action that conflicts with or violates the statute upon which the complaint was based." Id. at 526; see also Electronic Controls Design, 909 F.2d at 1355 (stating that a Clean Water Act settlement must be consistent with the law); Citizens for a Better Environment, 718 F.2d at 1126 (holding that a consent judgment must be fair and consistent with the public interest).

Plaintiff suggests that, because the United States elected not to intervene in this action, no further participation by the United States is appropriate. See, e.g., Plaintiff's Opposition at 3 ("Short of intervention, there is absolutely no legal basis upon which the government could demand that the Court set aside this Settlement Agreement."). On the contrary, although the United States has the right to intervene in citizen litigation, the United States also has a separate function of reviewing and commenting on citizen suit matters. These are distinct authorities, and the decision to exercise one (or not to do so) does not affect the availability of the other.

The United States is typically sparing in the exercise of its authority to intervene in a citizen suit. The United States has its own enforcement agenda and priorities, which may be distinct from those of a citizens' group. Moreover, citizen litigation is frequently adequate to address ongoing violations, so that United States participation is not needed. United States intervention may also have the effect of displacing a citizen group and therefore unintentionally

discouraging citizen enforcement. For all these reasons, United States intervention in citizen suits under the Clean Water Act is comparatively infrequent.

The United States's role in monitoring citizen litigation is distinct from its right to intervene. As the Ninth Circuit explained in Electronic Controls Design, following the 45-day review period under the Act, "if it finds the proposed judgment is not in accordance with the Act, the United States can object." Id. at 1352 n.2. The United States is ordinarily deferential to the parties' decisions in resolving a case, but will make comments when the proposed consent judgment is inconsistent with the law or the public interest. The objection is adjudicated by the Court, which has the authority to determine whether a particular settlement should be approved. The United States submits the present comments for the Court's consideration pursuant to this statutory role.[12/]

Notably, because the United States's monitoring function is distinct from its litigation authorities, the resolution of this suit, and the comments submitted herein, will not and cannot affect the authority of the United States to file its own enforcement action. Irrespective of the Court's resolution of the present matter, the United States will retain the full authority to proceed under its statutory enforcement authorities. See Section V.C infra (resolution of citizen action not binding on United States).

[12/] The United States routinely submits comments in citizen suit matters. To cite two recent cases in Oregon federal district court, the United States recently submitted comments in Molalla Irrigation Co. v. City of Molalla, No. 06-CV-773-PK, and in Sierra Club v. Silverado Trailers Inc., No. 06-CV-06080-TC. In both cases, the United States did not object to the consent judgment but submitted comments on the proposed supplemental environmental project.

II. THE TERMS OF THE PROPOSED CONSENT JUDGMENT FAIL TO ADDRESS THE ENVIRONMENTAL HARMS ALLEGED IN THE COMPLAINT.

Plaintiff's complaint alleges, among other things, that discharges from the Facility repeatedly violated the Facility's Permit. The 60-day Notice alleges that there were a number of SSOs, including SSOs from overflowing manholes that reached waters of the State and United States. Plaintiffs also submitted a supplemental notice, which alleged additional SSO violations.

On June 22, 2007, Defendants and Plaintiff Oregon River Watch agreed on a proposed consent judgment in this matter. It would settle all of Plaintiff's claims in the complaint, in the supplemental notice, or otherwise arising before its effective date. (See paragraphs 5.1 and 5.2.) The proposed consent judgment, however, does not contain injunctive requirements or otherwise impose responsibilities on Defendants that meaningfully address these environmental harms or provide a remedy for these alleged SSO CWA violations.

The proposed consent judgment has a number of provisions that, on their face, appear to address the issues set forth in the complaint. Upon review, however, and taking into account pre-existing legal requirements applicable to Defendants and their existing practices, it is apparent that these provisions provide little relief. To the extent that any requirements are new, the requirements they impose are exceedingly modest. Defendants have been quoted publicly as stating that this is the case. For example, a June 23, 2007 newspaper article described the revisions required by the consent judgment as "insignificant," and quoted one of Defendants' counsel as stating, "Much of this is already being done. . . There may be some minor adjustments. Are these changes significant? I don't think so." Agencies Settle Sewage Lawsuit, Eugene Register-Guard, June 23, 2007.

The United States spoke with Defendants in detail about the significance and effects of the proposed consent judgment language. Defendants' observations are reflected in the analysis below. (The United States was not able to independently verify their statements.) [13/]

The provisions addressing relief are contained in paragraphs 4.1 through 4.6 of the proposed consent judgment. Given the technical nature of these provisions, a review of each provision is set forth separately below. In summary, it appears that these provisions are largely illusory and will do little to prevent the recurrence of the alleged violations.[14/]

- Paragraph 4.1 of the consent judgment requires the City of Eugene to contract with a third-party auditor to conduct a performance audit of the operation and maintenance of the Facility in the manner required for the environmental management system ("EMS") to remain compliant with the International Organization for Standardization (ISO) 14001. An EMS is a set of problem identification and problem-solving tools that can be implemented in an organization in many different ways, depending on the organization's activities and needs. The most commonly used framework for an EMS is the ISO 14001 standard. It is our understanding that the Facility became ISO 14001 compliant in October 2001. Many ISO 14001 facilities contract with third parties to perform audits to ensure that the Facility remains ISO 14001 compliant. Defendants have stated that their existing written procedures provide for a periodic third-party performance audit. They state that the audit referenced in this provision of the proposed consent

[13/] On July 27, the United States requested an opportunity to likewise discuss these provisions with Plaintiff, but Plaintiff did not accept this invitation.

[14/] As discussed below, the most suitable way to address the environmental harm alleged here appears to be to provide for additional assurance that Defendants will upgrade the Facility in accordance with the Wet Weather Plan.

judgment would have occurred in any event, in a generally similar time frame, and based on criteria comparable to those in this provision. Thus, it appears that this provision makes very little change in the status quo.

- Paragraph 4.2 of the consent judgment requires Defendants to designate one or more employees as a permit compliance officer. The permit compliance officer may take such measures as he/she deems appropriate to develop and recommend standard operating procedures and practices ("SOPPs") to promote compliance with the Permit, and develop training programs.

Schedule D, Special Condition 9 of the existing Permit already requires the Facility to have the wastewater system supervised by "one or more operators who are certified in a classification and grade level that corresponds with the classification of the system." Therefore, it appears that the Facility already has an individual who is currently working in this supervisory capacity. The United States's conversations with Defendants have confirmed that they already had existing positions with responsibility for implementation of their environmental management systems, and that the individual with this role already has authority to develop standard procedures and to recommend training programs.

As we understand the circumstances based on conversations with Defendants, this settlement provision will expand the role of this position to include not just the EMS, but also permit compliance. Responsibility for permit compliance was previously shared between that individual and his or her management. This is a small change, given that an individual managing

an EMS will often also have the principal responsibility for other functions such as permit compliance.[15/]

- Paragraph 4.3 of the consent judgment requires the Metropolitan Wastewater Management Commission to contribute $65,000 to the Long Tom Watershed Council. This appears to be the only term of the consent judgment that requires Defendants to do something environmentally that exceeds in a significant way what they are already doing to comply with the Permit.

- Paragraph 4.4 of the consent judgment requires Defendants to estimate the volume of any discharges from the emergency overflow outfalls at the Willakenzie Pump Station, Fillmore Pump Station and Old Springfield Wastewater Treatment Plant Pump Station pursuant to SOPPs that are attached to the agreement. There is a separate (one-page) protocol for each pump station that provides a simple calculation based on the duration of the overflow and the rate of the flow.

Defendants are already required to estimate the flow duration and volume during an overflow event pursuant to Schedule B, Section 1.f of the Permit, and Defendants indicate that they previously had protocols in place for preparing such estimates. The new protocols differ from the old ones in two respects. As to the Fillmore and Old Springfield Pump Stations, they eliminate a previous methodology under which the operator could use his or her best professional judgment to estimate the flow rate based on factors such as equipment and

[15/] Notably, although the permit compliance officer can recommend SOPPs and training programs, this provision (1) does not require him or her to take any particular action with this authority; (2) only allows him or her to "recommend" operating procedures (which includes training), so that his superiors may decline to approve such recommendations; and (3) provides that any action under this provision will be in the sole discretion of Defendants and their employees, so that neither Plaintiff nor the Court may review action under this provision.

environmental conditions, and require instead that the estimates be prepared based on the maximum flow rate of the equipment in question. Defendants indicate that the new estimates will be somewhat higher (on the order of 15%, they state) than the previous estimates, since flow rates will no longer be discounted in an effort to estimate the actual rate of flow. The protocol for the Willakenzie Pump Station is somewhat different, and contemplates using flow rate data generated by recently-installed equipment, rather than the maximum flow rate of the equipment in question.

These changes appear to be quite modest. As to the first two pump stations, estimates of actual flow will be replaced with data based on maximum flow rates, with a fairly small change to the resulting data. (It is not clear to what extent the use of estimated flow rate values would have been binding in a subsequent enforcement proceeding in any event.) As to the third pump station, estimates based on the professional judgment of the operator will be replaced with estimates based on equipment data. Although this is a constructive change, it is possible that Defendants would have made that change in any event to exploit this capability of their recently-installed equipment.

Moreover, even if the protocols reflect a change in existing practice, the benefits are very limited. The consent judgment does not provide any consequences for future overflow events and expressly bars Plaintiff from filing a new lawsuit for ten years. Thus, it appears that the ability of Plaintiff to use this information will be limited and the burden on Defendants of complying with these requirements is likely to be very small.[16/]

[16/] Moreover, Defendants' Wet Weather Plan is intended to eliminate overflow events. According to the Plan, construction and implementation is to be completed by January 1, 2010. Implementation of the Wet Weather Plan is also required by state regulation. *See* OAR 340-041-

- Paragraph 4.5 of the consent judgment requires Defendants to provide Plaintiffs with a copy of any written notice provided to ODEQ upon occurrence of a bypass or overflow. Defendants are already required to provide ODEQ with a written notice in the event that there is a bypass or overflow at the Facility. See Schedule F, Section B.3 and B.6 of the Permit. These notices are a matter of public record. Thus, Plaintiff can obtain these notices from ODEQ through a Public Records Act request. Further, since Defendants are public entities, these notices and other relevant information are in all likelihood available from them directly as well. As a result, this element of the proposed consent judgment merely provides a shortcut for Plaintiffs to obtain information regarding bypasses and overflows at the Facility. This provision only applies for one year, so the shortcut notification is of very limited application.

Further, it is unclear what Plaintiff would do with this information since, as part of this consent judgment, they have agreed to a 10-year covenant not to sue Defendants. The consent judgment before the Court provides no substantive legal requirements governing future bypasses and overflows, so this information could not be used in applying that document. Plaintiff would also be barred from disclosing any materials received pursuant to this provision to any other person under paragraph 5.5 of the consent judgment. That provision expressly bars disclosure of "documents . . . provided in the future under the terms of this agreement, to Plaintiff by Defendants to any third person or organizations." It also applies "notwithstanding that some or all of the documents provided may be public records otherwise subject to public disclosure."

0009. Therefore, any additional information on overflow events from the new protocol will presumably be useful only during the interim period before completion of the Wet Weather Plan.

Thus, Plaintiff appears to have no legal remedy available once such information is received. The proposed consent judgment provides no relief or substantive standards if another bypass or overflow occurs; Plaintiff has surrendered its right to bring a further suit; and Plaintiff is not even able to disclose a copy of the document it receives under this provision to another organization or to EPA.

- Paragraph 4.6 of the consent judgment requires Defendants to provide Plaintiff with a copy of any revision to the 2004 Facilities Plan if the revision extends the projected completion date of the peak flow capital improvement project to a date beyond January 1, 2010.[17/] Defendants state that any revisions to the Facilities Plan would be adopted at a public meeting, and that they would anticipate that a change to the projected completion date that is after January 1, 2010 would be expressly noted at such a meeting. Because Defendants are public entities, such a document would presumably be available by a variety of methods in any event. Thus, this provision appears to make access to this information somewhat more convenient for Plaintiff, but has little other effect.

Moreover, the language of this provision does not address the circumstances or timing of the preparation of such revisions. There is no indication whether such revisions must be prepared or submitted in a timely way, or what standards govern the timing and content of a revision. This provision only involves providing a copy of a revision prepared for some

[17/] According to Defendants, the 2004 Facilities Plan contains a description and construction schedule for upgrading the entire Facility. The Wet Weather Plan is incorporated into the 2004 Facilities Plan to address the wet weather upgrades that will be completed at the Facility.

independent reason, and provides for no legal consequences to flow from a delay in construction.[18/]

Finally, as noted above, Plaintiff is legally barred from filing a new lawsuit, and would also be barred from disclosing documents received under this provision to any other person. Nor could a notice under this provision be used in enforcing the consent judgment, as the consent judgment contains no substantive standards relating to the completion of construction. Thus, it appears that this provision has little practical significance.

- Other provisions. The document also provides for a payment of $120,000 in attorney's fees. It also has provisions addressing releases of claims; a 10-year bar on suits by Plaintiff, its officers, staff, members, agents, successors and assigns; and a number of related provisions.

III. THE PROPOSED CONSENT JUDGMENT DOES NOT CONTAIN THE RELIEF THAT WOULD ORDINARILY BE APPROPRIATE FOR A CASE OF THIS NATURE

The claims in this case focus on SSO events. Defendants already have a plan to address such events through a construction program embodied in their Wet Weather Plan, scheduled for completion by 2010. Appropriate injunctive relief directed at abating such violations would ordinarily include an enforceable schedule for eliminating SSOs. In this case, such relief would

[18/] Plaintiff's filing describes this document as requiring of the Defendants that "when and if they ever have cause to believe that they will not be able to meet the 2010 schedule, they must advise River Watch as soon as they obtain this knowledge." Plaintiff's Opposition to Amicus at 9. In fact, this provision only requires that MWMC provide Plaintiff with a copy of any revision to MWMC's capital improvement plan, should MWMC prepare one. It does not state when such revisions must be prepared.

appropriately take the form of an enforceable schedule for implementing the Wet Weather Plan.[19/]

When the United States raised this issue with the parties, Defendants stated that no such relief was necessary, because their existing permit provides for them to execute this plan by 2010. Plaintiff likewise states in its filing opposing the United States's motion to appear as amicus curiae that they "made a decision that, given the requirements of the existing permit, it was not crucial to include a separate and additional commitment by the Defendants to live up to the terms of their DEQ permit." Plaintiff's Opposition to Amicus at 3.

Notably, however, the goal of the present suit was to redress violations of Defendants' permit. Therefore, to presume future compliance with permit terms may not be appropriate. Moreover, in the absence of a specific judicially enforceable schedule for completion, delays are frequent in eliminating municipal SSOs.[20/] Although failure to meet the 2010 deadline would be a permit violation, such a violation would accrue only after the deadline is missed. Redressing such a missed deadline could consume significant time and lead to unnecessary delay in the elimination of SSOs.

By contrast, if a judicially enforceable deadline were missed, that deadline could be enforced with the court's contempt power and other authority, thus providing a significant

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[19/] To the extent that violations also arise from SSOs that did not occur in wet weather, any consent judgment should also address those violations.

[20/] For this reason, EPA's guidelines for initiation of federal enforcement in federal SSO cases refer to the importance of "an appropriate administrative or judicial order that includes... complete relief, including (I) specific injunctive relief with milestones and a clear end date for completion of remedial measures." Guidelines for Federal Enforcement in CSO/SSO Cases, April 10, 2005, at 4-5.

incentive to Defendants to be diligent in completing their plan. As a result, there would be a very significant advantage to providing for a judicially enforceable deadline. For this reason, when the United States brings its own affirmative enforcement actions in similar contexts, it places considerable emphasis on such judicially enforceable deadlines.[21/]

IV. THE INSUFFICIENCY OF INJUNCTIVE RELIEF IS ENTITLED TO GREAT WEIGHT IN THE COURT'S ANALYSIS OF WHETHER TO APPROVE THIS CONSENT JUDGMENT

In its own enforcement actions under the Clean Water Act, and in negotiating consensual resolutions to cases under that Act, the United States places primary importance on securing enforceable relief that will govern the defendant's future conduct and will prevent future violations. In judicial actions this takes the form of injunctive relief; in administrative actions brought by EPA, it takes the form of an administrative order. Civil penalties and Supplemental Environmental Projects ("SEPs") also have an important role in the statutory scheme, but they in no way are a substitute for effective prospective relief that will prevent future violations. For example, EPA's policy document governing the development of SEPs states that "in settling enforcement actions, EPA requires alleged violators to promptly cease the violations and, to the extent feasible, remediate any harm caused by the violations." EPA Supplemental Environmental Project Policy at 1 (1998) (Attachment D).[22/]

[21/] An example of a recent consent decree involving municipal discharges is available at http://www.epa.gov/compliance/resources/cases/civil/cwa/alcosan.html. Other, comparable municipal consent decrees are available at http://cfpub.epa.gov/compliance/cases/ .

[22/] This document is available at http://www.epa.gov/compliance/civil/seps/ .

Neither civil penalties or SEPs (like the one at issue here) are an acceptable substitute for injunctive provisions requiring the violator to come into compliance with the Act. EPA's guidance for drafting consent decrees states that "consent decrees must require compliance with applicable statutes or regulations and commit defendants to a particular remedial course of action by a date certain."[23] Specific deadlines are particularly important in the SSO context, given the extensive advance planning required to address these types of discharges.[24]

The principal purpose of the citizen suit provision of the Clean Water Act is to allow private parties to abate violations of the law. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 61 (1987) (reviewing legislative history of these provisions).[25] This proposed consent judgment is deficient because, as explained in part II above, it contains very limited provisions addressing prevention of recurrence of the alleged violations identified in the complaint. When the United States resolves similar judicial claims, it typically insists on a

[23] Guidance for Drafting Judicial Consent Decrees, EPA General Enforcement Policy GM-17 at 10. (See Attachment C.) The guidance document notes that stipulated penalties are commonly required for violations. Guidance at 22. Likewise, EPA's guidance on the use of environmental management systems in enforcement settlements states that "EPA's approach in *all* enforcement actions is to seek appropriate injunctive relief to return violators to compliance and minimize or eliminate the potential for repeated violations by addressing the root causes of noncompliance." Guidance on the Use of Environmental Management Systems in Enforcement Settlements As Injunctive Relief and Supplemental Environmental Projects, June 12, 2003, at 1 (emphasis in original).

[24] Guidelines for Federal Enforcement in CSO/SSO Cases, April 10, 2005, at 4-5 (discussing "appropriate administrative or judicial order that includes... complete relief, including (i) specific injunctive relief with milestones and a clear end date for completion of remedial measures.")

[25] Notably, the text of the Clean Water Act citizen suit provision prohibits a citizen suit from being brought if the administrator of the EPA or a state "has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a state *to require compliance*..." 33 U.S.C. 1365(b)(1)(B) (emphasis added). This further demonstrates that the purpose of citizen suits is to "require compliance" and abate violations.

timetable for completing construction of improvements to eliminate SSOs, as well as provisions addressing penalties for future violations. This document contains neither element, and the injunctive provisions it contains are so limited as to be virtually illusory. Instead, the principal elements of the settlement appear to be a $65,000 payment for a supplemental environmental project, and a $120,000 payment of attorney's fees. It therefore appears that this settlement accomplishes little towards the abatement function of citizen suits.

In the Electronic Controls Design decision, the Ninth Circuit reviewed the principles that govern District Court approval of citizen suit consent judgments. The Court explained that a settlement must "come within the general scope of the case made by the pleadings," must "further[] the objectives upon which the law is based," and must not "violate the statute upon which the complaint was based." 909 F.2d at 1355 (citations omitted). At the time of the adoption of the Clean Water Act language providing for review by the United States, Senator Chafee likewise explained that this provision would allow the United States to object to any "abusive, collusive, or *inadequate* settlements." 133 Cong. Rec. S. 737 (daily ed. Jan. 14, 1987) (emphasis added).

There are grave questions as to the adequacy of the present settlement and its consistency with the objectives of the Clean Water Act, in light of the scant injunctive relief – but significant monetary relief – provided therein. By virtue of its role in reviewing proposed consent judgments, the United States is familiar with the typical resolutions of citizen litigation in which the United States is not a party, and can state that resolutions like the one at issue here are very unusual. As we have explained, the function of the citizen suit provisions is abating violations. Settlements like the one before the Court do not accomplish that function. Instead, they allocate

the bulk of relief to monetary payments, in the form of attorney's fees and beneficial projects. A settlement that does not attempt to abate any future violations that may occur, but instead provides for a payment of money, transforms a statutory scheme directed at abating pollution into one that effectively allows, but taxes, that activity. That is not the proper function of a Clean Water Act citizen suit.[26/]

The parties to a suit have some discretion in crafting relief, and it is possible that in some cases unusual or distinctive factors might permissibly result in a settlement with limited injunctive provisions. The United States has discussed this matter with the parties, and has not learned of any unusual considerations that emerged in the course of litigation that would explain the approach the parties took in resolving this case. Plaintiff states in its brief opposing the United States's participation as amicus that it does not wish to "spend what could amount to $1 million to take the case to trial." Plaintiff's Opposition To Amicus at 6. As a rule, however, an organization should not file a citizen suit unless it is willing to prosecute that suit diligently.[27/]

The United States has in the past objected to consent judgments that lacked appropriate injunctive relief. A copy of the United States's adverse comments on one such settlement is

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[26/] Cf. Public Interest Research Group v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 82 (3d Cir. 1990) (referring to the requirement that "citizens bring suits to protect the public health and welfare, and not for private gain.")

[27/] There may also be questions about the appropriateness of the attorney's fees component of settlements that lack a significant injunctive element. A case that is litigated to judgment but achieves limited relief may not warrant a full fee award. "[T]he extent of a plaintiff's success is a critical factor in determining the proper amount of award of attorney's fees." Hensley v. Eckerhart, 461 U.S. 424, 440 (1983); see also Farrar v. Hobby, 506 U.S. 103 (1992) (finding that a plaintiff who had recovered only $1 in nominal damages was not entitled to attorney's fees); Corder v. Brown, 25 F.3d 833, 836 (9th Cir. 1994).

appended as Attachment E; that case was brought by Northern California River Watch against the city of Fortuna, California. (Counsel for Northern California River Watch in that case was Mr. Jack Silver, who is co-counsel for Oregon River Watch in the present matter.) The United States subsequently withdrew its objection in that case after additional injunctive relief was incorporated in the consent judgment.[28/]

The United States spent a considerable amount of time discussing this proposed consent judgment with the parties during the settlement process, and seeking to induce them to incorporate additional injunctive relief in this document. Those efforts were not successful. The United States is now actively pursuing other avenues, involving administrative enforcement and permitting authorities, to ensure that Defendants complete the construction program

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[28/] A Congressional committee also held oversight hearings in 2004 at which two witnesses asserted that Northern California River Watch had engaged a pattern of bringing suit and seeking prompt settlements with principally monetary relief. Committee on House Transportation and Infrastructure, Subcommittee on Water Resources, Hearing on Clean Water Act and Citizen Lawsuits (September 30, 2004). One witness said:

> The membership of this group, Northern California Riverwatch, seems to consist of less than 10 persons. Riverwatch has threatened and collected settlements from all of the cities in our area. In one case of the larger city being challenged multiple times, Riverwatch changed its name, but the persons involved were the same. And so, the citizen suit provisions of the Clean Water Act have been co-opted as a new business of threatened litigation and a real goal of extracting money from entities that treat waste water.
>
> The "book" on a Riverwatch threat is to suggest a settlement as soon as possible. While the first reaction to a settlement is a rejection, no one has waited long for the settlement negotiations to begin. And they always begin with discussion about their cost to prepare the threat, some costs for their board members to review your plant and process and some other funding for public groups or pet projects.

Testimony of Jere Melo, Mayor, Fort Bragg, California.

contemplated by the Wet Weather Plan by January 1, 2010 so as to comply with the law. In light of this, the United States will not specifically request that the Court order the parties to incorporate additional injunctive relief in this proposed consent judgment. However, the United States requests that, if the Court enters the present consent judgment, it do so only after first inquiring into the circumstances that caused the parties to enter into this settlement. This will allow the Court to determine whether there are particular circumstances that justify adoption of the unusual provisions in this document.

The United States's concerns about the consistency of this proposed consent judgment with the purposes of the Act would be especially serious if similar circumstances should arise in future proposed consent judgments. For that reason, we now address that possibility.

V. IF THE COURT APPROVES THIS PROPOSED CONSENT JUDGMENT, IT SHOULD ONLY DO SO SUBJECT TO TWO JUDICIALLY MANDATED CONDITIONS

The United States opposes entry of this consent judgment unless the Court imposes (at a minimum) two judicially mandated conditions. The first condition relates to providing notice of future settlements to the United States, and the second relates to future settlements that lack meaningful injunctive provisions. We discuss these conditions further below.

A. United States Notice

The Court should address the applicability of the 45-day review requirement to documents captioned as "settlement agreements," and find that the 45-day review period and the judicial approval requirement apply to such documents. That requirement properly encompasses all settlement documents, irrespective of their captions, and whether that settlement is filed in

court or entered privately.[29/] The Court should expressly place Plaintiff on notice of this requirement, and also emphasize the importance of the review period requirement generally, so that other plaintiff organizations will be on notice of them.

The United States has already set forth in its previous brief in this matter (Attachment A) its position that the Clean Water Act's 45-day review period applies to the "settlement agreement" before the Court, and will not repeat that position in detail here. As explained in the United States's previous submission, the "settlement agreement" is a "consent judgment" for purposes of CWA Section 505, 33 U.S.C. § 1365. Moreover, to permit a document to escape Federal review merely because it is captioned a "settlement agreement" would defeat the purpose of the statute, which is to provide for United States review and comment on the resolution of citizen suits. This issue is therefore one of considerable systemic importance to the United States's participation in review of such resolutions of Clean Water Act citizen suits.

Plaintiff suggests in its brief addressing this issue that it is not necessary for the United States to receive settlement agreements in order to carry out its function of monitoring citizen litigation, because the United States receives copies of notices of intent to sue and complaints. Plaintiff's Opposition to Amicus at 6 n.3. On the contrary, it would not be feasible to monitor citizen litigation solely with information on the initiation of lawsuits, as the United States would then have no information as to when a settlement was concluded.

[29/] Notably, Mr. Silver has previously written a letter to the United States Department of Justice on behalf of his client Northern California River Watch stating that "Northern California River Watch insists on the preparation and filing of consent decrees rather than private, non-court supervised settlements." Letter from Jack Silver, Northern California River Watch v. Sonoma County Water Agency, April 12, 2006 (Attachment F). This letter sets out a helpful approach, which should be applied uniformly, including to litigation by the present Plaintiff and other organizations.

For the same reason, the fact that the parties have not objected to the United States's filing comments in the present case does not render this legal issue moot, because of the likelihood of repetition of this situation. In the absence of a prospective court order, the United States may not learn in a timely way that the parties have signed a settlement agreement, and thus may not be in a position either to press its argument that "settlement agreements" are subject to the 45-day review period, or to review the merits of such an agreement.

Congress specifically intended that the United States monitor the termination of Clean Water Act citizen suits. In the 1987 amendments to the Clean Water Act, Congress provided for the United States to receive copies of "proposed consent judgments." The Ninth Circuit has explained that these amendments were intended "to give the government more power to oversee and monitor the entry of consent judgments in citizens' suits." Electronic Controls Design, 909 F.2d at 1356. When this provision was adopted, Senator Chafee stated that this language would allow the United States to object to any "abusive, collusive, or inadequate settlements," 133 Cong. Rec. S. 737 (daily ed. Jan. 14, 1987), further underlining that monitoring the conclusion of citizen litigation is part of the United States's statutory function.

B. Heightened Scrutiny of Future Settlements.

The United States requests that the Court also include an express statement in its order that injunctive relief is a key factor in the Court's review of proposed consent judgments, and that settlements that incorporate limited injunctive relief will be subject to additional judicial scrutiny. This will discourage a repetition of the circumstances arising in this matter. As to both this and the 45-day notice requirements, the court would be setting forth a straightforward analysis of the law, and also placing Plaintiff on specific notice of these requirements.

Provisions like those in the present proposed consent judgment become especially problematic when they are part of an ongoing pattern of activity. A pattern of such resolutions indicates that the terms of these documents are not the result of unusual or case-specific considerations, but represent a general approach to bringing citizen suit actions. This is particularly true once a court has put litigants on notice that further settlements should not reflect provisions of this type.

C. The United States Will Not Be Bound by the Resolution of This Matter

As stated above, the United States is actively pursuing its enforcement and oversight options as to the Defendants in this case. As a matter of law, the settlement now before the Court does not and cannot affect a future enforcement action brought by the United States. The United States cannot be bound by settlements of citizen enforcement actions like this one. See, e.g., Hathorn v. Lovorn, 457 U.S. 255, 268 n.23, 102 S. Ct. 2421 (1982) (the Attorney General is not bound by cases to which he is not a party); Electronic Controls Design, 909 F.2d at 1356 n.8 (discussing this rule in the Clean Water Act context); United States v. Atlas Powder Co., 26 Env't Rep. Cas. (BNA) 1391, 1391 (1987) (same); 131 Cong. Rec. 15,633 (June 13, 1985) (statement of Senator Chafee, discussing Clean Water Act section 505(c)(3), and confirming that the United States is not bound by settlements when it is not a party). This legal rule is particularly important in light of the insubstantiality of this particular settlement.

D. Proposed Language For Court Order

We propose that the Court include the following language in any order approving the settlement to reflect the foregoing conclusions:

(1) The Court finds that the phrase "consent judgment" appearing in 33 U.S.C. 1365(c)(3) encompasses any document that relates to settlement or resolution of a federal citizen suit claim, whether captioned as a settlement agreement, consent decree, or otherwise, and whether or not the parties otherwise intend to seek judicial review of its terms. Such materials must therefore be submitted to the United States 45 days in advance, and then to the Court for its approval.

(2) In determining whether to approve a settlement of citizen suit claims in an action in which the government is not a party, the Court finds that the abatement function of the statute, and therefore the adequacy of injunctive relief, will be a key factor. Sierra Club v. Electronic Controls Design, Inc., 909 F.2d 1350, 1355 (9th Cir. 1990); Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 61 (1987). Any monetary payments should be supplemental elements of a settlement. A settlement with limited injunctive relief will be subject to heightened judicial scrutiny.

(3) Plaintiff is specifically placed on prospective notice of these two legal requirements.

We would be pleased to submit additional or alternative language at the Court's request.

CONCLUSION

For the reasons set forth above, if the Court finds it is appropriate to approve this consent judgment, the United States requests that the court do so only on the condition that (1) the court finds that "settlement agreements," irrespective of their form or caption, and including all elements of the settlement, are subject to United States review pursuant to Section 505 of the CWA, 33 U.S.C. § 1365, (2) injunctive relief is a key feature of such settlements, and (3) Plaintiff is specifically placed on prospective notice of these two determinations.

Dated: August 3, 2007

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